Doug

Mem. 28. 78 aug

6-148

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 492.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 11, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 492.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	4	2
Plea	5	3
Jury waived	6	4
Agreed statement of facts	7	4
Judgment	16	7
Assignment of errors	18	7
Joinder in error	20	8
Bond	21	8
Citation	23	9

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John M. Davies and Robert K. Davies, plaintiffs, against Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said John M. Davies and Robert K. Davies, plaintiffs, as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23d day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ of error is allowed.
October 23d, 1875.

[SEAL.] SAM'L BLATCHFORD,
Judge.

2 (Indorsed:) U. S. Supreme Court. John M. Davies & al., p'fs in error, vs. Chester A. Arthur, def't in error. Writ of error. Filed Oct. 23, 1875.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, do hereby certify, that by virtue of the foregoing writ of error, and in obedience thereto, that the following pages, numbered from one to 24, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of John M. Davies and Robert K. Davies, plaintiffs in error, against Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1872, to wit, of the 21st day of February, in the year of our Lord one thousand eight hundred and seventy-three.

Witness the honorable William J. Wallace, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the 21st day of February, 1873, in October term of the year 1872, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came John M. Davies and Robert K. Davies, by Chase, Hartley & Coleman, their attorneys, and brought into the said court, before the aforesaid judges thereof, then and there, their certain declaration against Chester A. Arthur, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

4 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the October term, in the year one thousand eight hundred and seventy-two, to wit, of the 21st day of February, A. D. 1873.

JOHN M. DAVIES & ROBERT K. DAVIES }
vs.
CHESTER A. ARTHUR. }

John M. Davies & Robert K. Davies, plaintiffs in this suit, come into court, and by Chase, Hartley & Coleman, their attorneys, give the court now here to be informed that heretofore, to wit, on the eighteenth day of September last past, this action was commenced in the supreme court of the city and county of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiffs against the defendant herein upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court. That the defendant afterwards, by his attorney, Noah Davis, esquire, duly appeared in said action, and thereupon on the twenty-first day of February, in the year one thousand eight hundred and seventy-three, the said action was duly removed by writ of certiorari for further prosecution into this court, according to the act of Congress in such case made and provided; and the clerk of the said supreme court did thereupon return the said writ with the said summons, and duly file the same in this court, which allegations the defendant admits to be true.

Wherefore, let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their said attorneys, complain of said defendant of a plea of trespass on the case for promises, for that, whereas said defendant, on the 18th day of September, eighteen hundred and seventy-two, at New York City, in the district aforesaid, was indebted

to said plaintiffs, who are partners in trade under the firm-name of John M. Davies & Company, and as such firm, in the sum of one hundred and eighty-one and $\frac{50}{100}$ dollars, lawful money of the United States of America, for duties on merchandise, to wit, neckties imported into and entered at the collection district of the United States for the city of New York, on or about the tenth day of April, in the year one thousand eight hundred and seventy-two, in the following vessels, to wit: the City of Montreal, from Liverpool, unlawfully demanded, exacted, and received, at said New York City by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforsaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of two hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant. And for other money by the said defendant, before that time had, and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money, or any or either of them, or any part thereof to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs, has hitherto refused, and still does refuse, to the damage of the said plaintiffs of one thousand dollars, and therefore the said plaintiffs bring suit, &c.

5 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR *ads.* JOHN M. DAVIES & AL.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEORGE BLISS,
Defendant's Attorney.

6 Therefore the issue above joined is ordered by the said court to be tried at the circuit court appointed to be held at the United States court-building, in the city of New York, on the first Monday of April, in the year 1875.

At which day and place, before William J. Wallace, esquire, one of the judges of the said circuit court, according to the form of the statute in such case made and provided, as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid, and the said attorneys having signed a stipulation waiving a trial by jury, and consenting that said issue be tried before the judge of the said court, and the said stipulation having been filed with the clerk of the said court, the following stipulation was thereupon entered into by and between the parties:

That the plaintiffs and defendant in the above-entitled action hereby agree to waive their respective rights to a trial by jury therein, and consent that the issues therein be tried by the court upon the fol-
7 lowing statement of facts, which the said parties respectively do hereby agree upon and present to the court as the facts in the case, to wit:

First. The plaintiffs, who have been since April 1, 1872, partners in business, under the firm-name of John M. Davies and Company, in April, 1872, imported from Liverpool, England, into the port of New York certain merchandise, a portion of which is described on the invoice thereof used on duty as "Ducape Eglington ties," and said ties were then and there articles manufactured of silk, and used and known as neckties, and were valued on said invoice at a net valuation of £143 16 0, equivalent to $696 in gold coin. A certain other portion of said merchandise is described on said invoice as "twill silk cut up," and is valued on said invoice at a net valuation of £48 7 10, equivalent to $234.13 gold. The said silk ties and cut up were part of the merchandise described on said invoice as the contents of a case marked ◇D◇ numbered 8105.

Second. The merchandise imported as aforesaid and described upon said invoice was entered for consumption by the plaintiffs on
8 April 12, 1872, by said invoice an by an entry in writing produced to the defendant, who was then and there collector of customs of the United States at said port, on which written entry the contents of said case ◇D◇ 8105 are described as "one case silk ties, cotton hose, and buttons," and the aggregate of the said net valuation of the said Ducape Eglington ties and twill silk cut up, described on said invoice, was entered by the plaintiffs on said written entry as under the dutiable rate of sixty per centum ad valorem, other portions of the merchandise on said entry being placed respectively under the dutiable rates of thirty, thirty-five, and fifty per centum ad valorem.

Third. On April 17, 1872, the said "Ducape Eglington ties" were returned by the United States appraiser at said port, in his report an examination and appraisal thereof, to said collector, as silk scarfs, subject to duty at the rate of sixty per centum ad valorem, and the said twill silk, cut up as silk in pieces, subject to the like rate of duty.

Fourth. The defendant, as collector, thereupon decided the rate and amount of duties to be paid on said ties and cut up, and claimed
9 and exacted from the plaintiffs duty on the said entered net valuation of said ties, at the rate of sixty per centum ad valorem, the sum of four hundred and seventeen $\frac{60}{100}$ dollars in gold coin, and on the

said entered net valuation of said silk cut up, at the same rate of duty' the sum of one hundred and forty-two $\frac{80}{100}$ dollars, in gold coin, at which sums respectively the duties on said ties and said cut up were then and there ascertained and liquidated by the proper officer of the customs, and thereupon the plaintiffs paid the said respective sums so claimed and exacted as aforesaid to said defendant.

Fifth. On April 18, 1872, the plaintiffs gave to the said collector a notice, in writing, of protest against the said assessment and exaction of duties upon said ties and cut up, of which a copy is hereto annexed, marked "Exhibit A," and on the same day appealed to the Secretary of the Treasury from the said decision, claim, and exaction of the said collector, a copy of which appeal is hereto annexed, marked "Exhibit B."

Sixth. On June 24, 1872, the Secretary of the Treasury ren-
10 dered his decision upon said appeal, affirming the said decision of the said collector, a copy of which decision is hereto annexed, marked "Exhibit C."

Seventh. This action was commenced against the said defendant on September 18, 1872, to recover $181.50 as the difference between the duties on said ties at sixty per cent. ad valorem, exacted by said collector, and the amount of duties thereon claimed by the plaintiffs to be the lawful duties thereon, and on October 4, 1872, the plaintiffs served on defendant's attorney the bill of particulars therein, as required by law, of which a copy is hereto annexed, marked "Exhibit D." It being admitted by the plaintiffs and defendant, respectively, that the said "Ducape Eglington ties" described in said invoice when so imported, entered, appraised, and assessed, and duties collected thereon by the defendant, as aforesaid, were subject to duty at the rate of fifty per centum ad valorem under the final clause of section nine of the act of Congress approved June 30, 1864, entitled "An act to increase duties on imports, and for other purposes."

The question is submitted to the court on the foregoing facts
11 whether, under the protest of the plaintiffs above set forth, said plaintiffs can recover in this action the difference between the amount of duties payable on said Ducape Eglington ties at the rate of fifty per centum ad valorem and the amount claimed and exacted by the defendant on the same at the rate of sixty per centum ad valorem, as aforesaid.

If the court shall consider that the plaintiffs can on the foregoing statement of facts recover the difference aforesaid under said protest, judgment shall be for the plaintiffs for sixty-nine $\frac{50}{100}$ dollars and costs; otherwise for the defendant, with costs.

12 EXHIBIT A.

NEW YORK, *April* 18, 1872.

SIR: We protest against your assessment of duty at 60 per cent. on the neckties and wearing-apparel in case $\frac{D}{1}$, 8105, &c., entered by us for consumption, April 10, 1872, per city of Montreal, from England, because they should only pay duty, being articles worn by "men, women, or children," &c., & "wearing-apparel," under sections 22, act of March 2, 1861, & 13, act of July 14, 1862, at 35 per cent. ad valorem.

They are neither "scarfs" nor ready-made clothing in fact nor as known in trade and commerce.

We pay the excess under compulsion, solely to get the goods.

JOHN M. DAVIES & CO.,
By CHASE, HARTLEY & COLEMAN,
Att'ys, 51 William St.

C. A. ARTHUR,
Collector of Customs, New York City.

13 EXHIBIT B.

NEW YORK, *April* 18, 1872.

SIR: We appeal from the assessment of duty at 60 % on the silk neck-ties and wearing apparel (case ⟨D⟩ j, 8105, &c.), by the collector of this port, entered by us for consumption, April 10, 1872, per City of Montreal, from England, because of the reasons stated in our protest of this date, filed with said collector, to which you are referred.

Very resp'y,

JOHN M. DAVIES & CO.,
By CHASE, HARTLEY & COLEMAN,
51 *William St., Att'ys.*

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury,
Washington, D. C.

14 EXHIBIT C.

TREASURY DEPARTMENT,
June 24, 1872.

GENTLEMEN: I acknowledge the receipt of your appeal (No. 4275 d.), dated April 18, last, from the decision of the collector of the port of New York, assessing duty at the rate of 60 per cent., ad valorem, on certain silk neck-ties imported by you per City of Montreal, April 12, 1872, and to say that on full consideration of the case the department has affirmed the decision of the said collector, who has been advised accordingly, and to whom you are referred for particulars.

Very respectfully,

J. F. HARTLEY,
Acting Secretary of the Treasury.

To Mess'rs J. M. DAVIES & Co.,
Per Chase, Hartley & Coleman, attorneys, 51 William street, New York.

15 EXHIBIT D.

Supreme court, city & county of New York.

JOHN M. DAVIES & ROBERT K. DAVIES
against
CHESTER A. ARTHUR.

SIR: This action is brought to recover duties illegally exacted by defendant as collector of customs at the port of New York.

Name of importer-plaintiffs as the firm of John M. Davies & Co.

Description of goods: silk neck-ties.

Vessel whence imported: City of Montreal, from England.

Date of invoice.....March 27, 1872.
" " entry.....April 10, "
" " payment of duties in excess..... " " "
" " protest (when filed)..... " 18, "
" " appeal to the Secretary of the Treas'y..... " " "
" " decision by " " " " " on said appeal.....June 24, 1872.

Amount of duty paid in excess, $181 $\frac{50}{100}$.

CHASE, HARTLEY & COLEMAN,
Att'ys for Pl'ff, 51 William St.

To Hon. NOAH DAVIS,
Def'ts Att'y.

16 Whereupon all and singular the premises aforesaid being seen and by the court here fully understood, and mature deliberation being thereupon had, it appears to the said court now here that the said defendant did not undertake and promise in manner and form as the said plaintiffs have above complained against him.

Therefore it is considered that the said plaintiffs take nothing by their said declaration, but that they be in mercy, &c. And that the said defendant do go thereof without day, &c.

And it is further considered by the said court now here that the said defendant do recover against the said plaintiffs twenty-four $\frac{00}{100}$ dollars for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant, and with his assent, according to the form of the statute in such case made and provided, and that the said defendant have
17 execution thereof, &c.

Judgment signed this 14th October, 1875.

R. E. STILWELL,
Dep'y Clerk.

(Indorsed:) U. S. circuit court. Chester A. Arthur, ads. John M. Davies & al. Judgment recorded. Geo. Bliss, def't's att'y. Filed Oct. 19, 1875.

18 Supreme Court of the United States.

JOHN M. DAVIES AND ROBERT K. DAVIES, plaintiff's in error, *vs.* CHESTER A. ARTHUR, DEFENDANT IN ERROR. } In error. October term, 1876.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, came the said plaintiffs in error, by Hartley & Coleman, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error, Chester A. Arthur, against the said plaintiffs in error, John M. Davies and Robert K. Davies; whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they,

the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

19 HARTLEY & COLEMAN,
Attorneys for Plaintiff' in Error.

(Endorsed:) U. S. Supreme Court. J. M. Davies & al., pl'ffs in error, vs. Chester A. Arthur, def't in error. Assignment of error. Due service of a copy hereof is hereby admitted this 23d day of October, 1875. George Bliss, att'y for def't in error. Filed Oct. 23, 1875.

20 Supreme Court of the United States.

JOHN M. DAVIES & ROBERT K. DAVIES, PLAINTIFFS IN ERROR,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in this same term, the said Chester A. Arthur, defendant in error, by George Bliss, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

GEORGE BLISS,
Attorney for Defendant in Error.

(Endorsed:) U. S. Supreme Court. J. M. Davies & al., pl'ffs in error, vs. Chester A. Arthur, def't in error. Due service of a copy hereof is hereby admitted this 23d day of October, 1875. Hartley & Coleman, att'ys for pl'ffs in error. Filed Oct. 23, 1875.

21 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOHN M. DAVIES AND ROBERT K. DAVIES, PLAINTIFFS IN ERROR,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

Know all men by these presents that we, John M. Davies, of 37 West 56th street, New York, Frederick C. Jones, of 125 West 13th street, New York, and Charles L. Brackett, of 112 Madison street, Brooklyn, are held and firmly bound unto the above-named Chester A. Arthur, defendant, in the sum of one hundred dollars, to be paid to the said Chester A. Arthur, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the twenty-second day of October, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above-named John M. Davies & Robert K. Davies have prosecuted a writ of error to the Supreme Court of the United States to

reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN M. DAVIES. [L. S.]
FRED'K C. JONES. [L. S.]
CHA'S L. BRACKETT. [L. S.]

Sealed and delivered, and taken and acknowledged, this 22d day of Oct., 1876, before me.

R. E. STILWELL,
U. S. Com.

22 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John M. Davies, Frederick C. Jones, and Charles L. Brackett, each being duly sworn, do depose and say, and each for himself saith, that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

JOHN M. DAVIES.
FRED'K C. JONES.
CHA'S L. BRACKETT.

Sworn to this 22d day of October, A. D. 1875, before me.

R. E. STILWELL,
U. S. Com.

The foregoing bond is approved as to form and amount and the sufficiency of the sureties, the district attorney having stated to me in writing that he is satisfied with its form and amount.

Oct. 23, 1875.

SAM'L BLATCHFORD.

Filed this 23d day of Oct., 1875.

23 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To CHESTER A. ARTHUR,
Defendant in Error:

Whereas John M. Davies and Robert K. Davies, plaintiffs in error, have brought and presented a writ of error, lately issued out of the Supreme Court of the United States, and said writ of error directed to the judges of the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said circuit court before the judges thereof, between the said John M. Davies and Robert K. Davies, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said John M. Davies and Robert K. Davies; and whereas for the correction of that error in due manner the

said writ has been issued returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the second Monday of October, 1876:

You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October, 1876, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the twenty-third day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

SAM'L BLATCHFORD.

24 (Indorsed:) U. S. circuit court. J. M. Davies & al., pl'fs in error, vs. Chester A. Arthur, def't in error. Citation. Due service of a copy hereof is hereby admitted this 23d day of October, 1875. George Bliss, att'y for def't in error. Fil'd Oct. 23, 1875.

(Indorsement on cover:) No. 492. John M. Davies & Robert K. Davies, plaintiffs in error, vs. Chester A. Arthur, collector of the port of New York. S. New York C. C. U. S. Filed 11th October, 1876.

S Hamilton's Son, Printer, 61 Cedar Street, N. Y.

U. S. Supreme Court.

JOHN M. DAVIES, *et al.*,
Plaintiffs in error,
vs.
CHESTER A. ARTHUR,
Collector, &c.

OCTOBER TERM, 1877.

No. 492.

BRIEF FOR PLAINTIFS IN ERROR.

STATEMENT.

In April, 1872, plaintiffs imported certain "Ducape Eglinton Ties," which were "manufactured of silk and used and known as neckties."

The appraiser reported them to the Collector of Customs as "silk scarfs subject to duty at the rate of 60 per cent. *ad valorem*," which report he adopted and collected duty accordingly. Thereupon plaintiffs filed with the Collector the following protest, viz.:

"We protest against your assessment of duty at 60 per cent. on the neckties and wearing apparel in case [D] J, 8105, entered by us for consumption April 10, 1872, per City of Montreal,

from England, because they should only pay duty being articles worn by men, women and children," &c., and "wearing apparel," under Section 22, Act of March 2, 1861, and 13 Act of July 14, 1862, at 35 per cent. *ad valorem.*

They are neither "scarfs" nor ready made clothing in fact, nor as known in trade and commerce. We pay the excess under compulsion solely to get the goods."

And appealed to the Secretary of the Treasury, as required by law, who affirmed the decision of the Collector, whereupon plaintiffs brought this suit.

The trial was had upon an agreed statement of facts which contained the following clause:—"It being admitted by the plaintiffs and defendant respectively, that the said Ducape Eglington Ties * * * were subject to duty at the rate of fifty per centum *ad valorem* under the final clause of Section 9 (sic) of the Act of Congress, approved June 30, 1864, entitled "An Act to increase duties on imports and for other purposes," the question is submitted to the Court on the foregoing facts, whether under the protest of the plaintiffs above set forth, said plaintiffs can recover in this action the difference between the amount of duties payable on said Ducape Eglington Ties, at the rate of fifty per centum *ad valorem* and the amount claimed and exacted by the defendant at the rate of sixty per centum *ad valorem* as aforesaid." Record folios 7 to 15.

ASSIGNMENT OF ERROR.

We assign for error, the judgment of the Court in favor of the defendant, and the refusal of the Court to give judgment for the plaintiffs.

BRIEF.

The question here is, whether on the facts, the protest was sufficient to enable plaintiffs to recover money admittedly exacted from them by defendant, in excess of the lawful duties.

We propose to examine the sufficiency of the protest under two views—1st. If the true rate of duty on the goods was 35 per cent., then the protest was sufficient. 2nd. If it was 50 per cent, then the protest was sufficient.

FIRST.

Although the parties have agreed that the legal rate of duty on these neckties was 50 per cent. instead of the 60 per cent. exacted, this Court is not bound by their agreement as to what the law is, and the admission itself in the record by a curious fatality is laid under a clause of the Statute relative to manufactures of glass, having no reference to the issues in this case. (See 13 Stats., 211, last clause of Section 9, and Record folio 10.) The admission was based on Smythe *vs.* Fiske, 23 Wallace, 374, in which this Court held that silk neckties were dutiable at 50 per cent. instead of 60 per cent, as there and here exacted.

It is needless to cite precedents to support the position that if this Court is satisfied that its decision is wrong, or based on an imperfect view of the facts or law, that it will review its decision in another case on the same subject matter.

We submit that the case of Smythe *vs.* Fiske, should properly be reviewed at this time for the true interests of the Government and all other parties to correct the uncertainty and confusion it has created in an elaborate and intricate system of tariff laws, in the administration of which, settled and consistent rules of interpretation are vital.

That case as reported shows that the decision was based on what the Court concluded was the intention of the framers of the Act of 1864, that the 8th Section "covers the whole subject of silk in all its variety of forms." (23 Wallace, p. 381, upper middle), a position not taken nor argued by counsel on either side.

The case was submitted on the record and printed briefs. Plaintiff in error made the single point that the rate of 60 per cent. taken by the Collector was proper by virtue of the similitude clause of the Act of 1842. Defendant in error to support the judgment rendered below by the late Justice Woodruff contended that the goods were provided for at 35 per cent. in acts prior to 1864, and consequently not to be provided for by "similitude."

The charge of the Judge who tried the case below did refer to the view that the goods were dutiable at 50 per cent. under the clause finally relied on by this Court.

But no assignment of error was here made by the Attorney General on that point, on the contrary, he expressly abandoned it.

Brief of Atty. Gen. and Solicitor Gen. in Smythe *v.* Fiske, p. 7-8.

"In this connection we are disposed to admit that the word *silk*, when used in the act as a substantive, unless where qualified by its context, refers to raw silk, (see also in the same connection *cotton and flax*), and therefore that the phrase "manufactures of silk," refers, in such act, presumptively, to silk thread, or silk goods, and therefore that the sections in which it occurs, cannot be cited as *otherwise providing* for articles of silk "made up," &c., so as to affect the extent of the above residuary provision."

"We *therefore shall not contend that neckties are included in the provision. 'On all manufactures of which silk is the component material of chief value, not otherwise provided for, 50 per cent'.*"

Under these circumstances would opposing counsel have been justified in arguing a point thus waived, or could it fairly be said, in the language of rule 21, that it was such "a plain error not assigned," that the Court would notice instead of disregarding it, so that opposing counsel were chargeable with error and lack of reasonable foresight as to the action of the Court. We think not.

The facts in Smythe *v.* Fiske, and the case at bar are alike.

In each case the goods were "neckties" made of silk, and so known and used. The collector took a duty of 60 per cent. on them as "silk scarfs." The importer claimed, by his protests, that the goods were neckties, and that the true duty was 35 per cent. The goods were not scarfs nor ready made clothing.

Smythe *v.* Fiske, 23d Wall. 374-375-382.
Record, folio 8-9-12.
Statutes.

The statutes necessary to be examined in ascertaining the intention of Congress upon the dutiable character and classification of these goods, are as follows:

Act August 30th, 1842, to provide revenue and change and modify duties. 5th Statutes at Large.

§ 1, page 549, near middle.

On ready made clothing, &c., 50 per cent.

"On all articles worn by men, women and children, *other* than as above specified or excepted, of *whatever* materials composed, made up wholly or in part by hand," 40 per cent.

§ 3, page 550

"All manufactures of silk not otherwise specified, except bolting cloths, two dollars and fifty cents per pound, of sixteen ounces." * * Then follows a great variety of articles, upwards of thirty in number, made of silk, at special rates, concluding. "And all other articles of silk, made up by hand, in whole or in part, and not *otherwise provided for*," 30 per cent.

Act July 30th, 1846, reducing duties, &c., 9th Statutes.

Sched. C., page 44.

"Articles worn by men, women and children, of whatever material composed, made up or made wholly or in part by hand," 30 per cent.

Page 45, near top.

"Clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress or manufacturer," 30 per cent.

Sched. D, page 46, middle.

"Manufactures of silk, or of which silk shall be a component material, *not otherwise provided for*," 25 per cent.

Act March 2d, 1861, 12th Statutes, to regulate and fix duties, &c.

§ 16, page 186.

Silk goods and articles at various rates, including silk ribbons, galloons, braids, fringes, tassels, buttons, button-cloths, trimmings, silk twist and sewing silk, concluding with, "And all other manufactures of silk, or of which silk shall be the component of chief value, *not otherwise provided for*," 30 per cent.

§ 22, page 192, upper middle.

"Manufactures of silk, or of which silk shall be *a component material, not otherwise provided for*," 30 per cent.

Manufactures in part of silk, &c.

Manufactures of silk, embroidered, &c.

§ 22, page 191, near top

"Articles worn by men, women or children, of *whatever material composed*, made up or made wholly or in part by hand, *not otherwise provided for*," 30 per cent.

Ibid, near middle.

"Clothing ready made and *wearing apparel of every description, of whatever material composed*, except wool, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer," 30 per cent.

Act August 5th, 1861, 12th Statutes, to provide increased revenue from imports, &c.

§ 2, page 293, near middle.
Silk goods and articles at various rates, including silk ribbons, gailoons, braids, fringes, laces, *buttons*, button-cloths, trimmings, silk twist and sewing silk, concluding with, "And all other manufactures of silk, or of which silk shall be the component material of chief value, *not otherwise* provided for," 40 per cent.

No mention is made in this Act of articles worn by men, &c., nor of Wearing apparel, &c., nor of any other Silk articles or goods.

Act July 14th, 1862; 12th Stats., increasing duties, Sec. 13, page 555.

§ 13. From and after the day and year aforesaid, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected and paid on the goods, wares and merchandise enumerated and provided for in this section, imported from foreign countries, a duty of five per centum *ad valorem*, that is to say,

Page 556, top:

Articles worn by men, women and children, of whatever material composed, made up or made wholly or in part by hand, not otherwise provided for.

Ibid middle.

Clothing ready made and wearing apparel, of whatever description, of whatever material composed, except wool made up or manufactured wholly or in part by the tailor, seamstress or manufacturer.

Page 557, near top.

Manufactures of mixed materials in part of silk, &c., and manufactures of silk if embroidered, &c.

NO GENERAL SILK CLAUSE OR SECTION EXISTS IN THIS ACT SUCH AS ARE FOUND IN THE PRECEDING ACTS.

The Act of June 30, 1864, to increase duties on imports, and for other purposes, 12th Stats.

§ 8., p. 210.

Imposes varying rates of duty on spun silk, silk in the gum, floss silk, sewing silk, and 60 per cent. duty on dress and piece silks, ribbons, velvets, and also on "silk vestings, pongees shawls, SCARFS, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch chains, webbing, braids, fringes, galloons, tassels, cords and trimmings," and "on all manufactures of silk or of which silk is the component material of chief value, *not otherwise provided for*," 50 per cent.

No mention is made in this Act of "articles worn by men, women and children, &c., nor of clothing ready made, and *wearing apparel* of whatever description, of whatever material composed, except wool, &c.

§ 5, p. 207, lower middle.

Provides for "flannels composed in part of silk," 50 per cent.

And for "clothing ready made, and wearing apparel of every description composed in part of wool," [the remaining part of silk, which may be of chief value.]

p. 208, top.

"Balmorals and goods of a similar description, *or used for like purposes*, composed of wool, worsted, or *any other material* [providing thus for silk petticoats].

p. 208, near middle.

Lastings * *silk* * woven or made in patterns * for shoes, slippers * and buttons exclusively *

§ 13, p. 214, middle.

Pipe cases * and all smokers articles. [Velvet, satin & silk pipe cases and pouches for meerschaums, silk pouches for smoking tobacco, and silk smoking caps.]

§ 22, p. 216.

"That all Acts and parts of Acts repugnant to the provisions of this Act, be, and the same are hereby repealed, *provided* that the existing laws shall extend to and be in force for the collection of the duties imposed by this Act * as fully and effectually as if every regulation, * provision, clause, matter and thing to that effect in the existing laws contained, had been inserted in and re-enacted by this Act. *And provided further*, that the duties upon all goods, wares and merchandise imported from foreign countries not provided for in this Act, shall be and remain as they were according to existing laws, prior to the twenty-ninth day of April, eighteen hundred and sixty-four."

Note.—The reference here to the date April 29, 1864, is because by joint resolution of April 29, 1864 (13 Stats. 405), all duties were temporarily increased 50 per cent.

Act of March 3, 1865, an Amendatory Duty Act, 13th Stats.

§ 3 page 493. "From and after this act takes effect in lieu of the duties heretofore imposed by law on the importation of the articles mentioned in this section there shall be levied, collected, and paid the following duties and rates of duty, that is to say," last clause "on ready made clothing of silk, or of which silk shall be a component material of chief value sixty per centum, *ad valorem*."

Act July 14, 1870, 16th Stats. As to duties altering and amending them—Some increased, others lowered. § 21, page 262.

Page 264, near bottom:

"On *buttons* and on ornaments for dresses," &c., made of silk, or of which silk is the component material of chief value, &c., 50 per cent.

ARGUMENT.

I. The Court laid it down as a rule of construction in Smythe *v.* Fiske, that

"Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction."

And it based this doctrine upon Taylor *v.* United States, 3 How. 197, and Cliquot's Champagne, 3 Wall. 115.

As this doctrine has never before been applied to the construction of Tariff Laws it becomes necessary to examine those cases to see whether they sustain it.

In order properly to understand the scope of the decision by Judge Story at December Term, 1844, in Taylor *v.* United States, 3 How. 197, commencing at lower part of page 210, we must go back to the case as reported in the Court below, vide Crabbes' Reports, p. 356. There at the bottom of p. 363 the

question is stated by Judge Hopkinson; and again later in the case p. 375, commencing with "another much more important question," &c.

All there is to the case is that a man having succeeded in passing a fraudulent invoice through the Custom House, set up the plea that the United States, in an action to punish him for that fraud were estopped, because its officers had once passed it as correct, and the provisions of law relied on by the government were penal and to be strictly construed. The Court ruled otherwise.

The same ruling was again had by this Court in Cliquots Champagne, 3 Wall. 114, 144-5, which was another case of fraud on the revenue by false invoices, &c.

These decisions were in strict accordance with Blackstone, Book I, p. 88, "Statutes against frauds are to be liberally and beneficially expounded;" "where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine it is then to be taken strictly; but when the statute acts upon the offence by setting aside the fraudulent transaction here it is to be construed liberally."

Those provisions of the Revenue Laws relating to offences and their means of prevention and punishment, are within the foregoing principles. But Tariff provisions prescribing rates of duty, are sui generis and though in one sense "revenue laws" are not within the meaning, reason or principle of the decisions. Probably no judge who ever sat in this Court, has been more pronounced in his determination to protect the citizen against arbitrary exactions under loose constructions of statutes imposing duties than Judge Story. No better illustrations of his views can be given than those contained in his dissenting opinion in Carey *v.* Curtis, 3 How 252, delivered at the *same term* as the opinion of the Court announced by him in Taylor *vs.* United States *supra*.

It must never be forgotten that the people in our constitution have so jealously restricted the taxing power, that § 7 art. I provides "all bills for raising revenue shall originate in the

House of Representatives; but the Senate may propose or concur with amendments as on other bills."

They would allow neither the Executive nor the Judicial Departments, nor even the Senate of the Legislative Department so much as to suggest or originate a bill for taxation.

That jealousy is fitly expressed by Judge Nelson in Powers *v.* Barney, 5 Blatch. p. 202: "Duties are never imposed on the citizen upon vague or doubtful interpretations."

See also Adams *v.* Bancroft, 3 Sumner 384.
U. S. *v.* Wiggleworth, 2 Story 369.

This is in accordance with the natural fitness of things, for what redress has one man against forty millions, if the doubt on the Statute book is unfairly cast against him; whereas, if the doubt is cast against the statute, the legislature has it always in its power to right itself promptly by new legislation if the doubt has been wrongfully cast against it, while the citizen is powerless.

So we say that Tariff Laws are not to be liberally construed in favor of the taxing power.

I.—All Tariff Acts are to be construed together. Tariff Acts are all in *pari materia*.

Stuart *v.* Maxwell, 16 How., 150, 160.
Pennington *v.* Coxe, 2 Cranch., 33, 58.

"All acts in *pari materia* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

Potter's Dwarris, p. 189.

"It is a general rule in the construction of statutes," said Lord Mansfield, "that all which relates to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken together, and construed consistently." Ibid. p. 190.

In every one of the statutes under consideration, where appears the term "manufactures of silk," whether it be that alone, or "manufactures of silk, or of which silk shall be the component material," or "manufactures of silk, or of which silk shall be the component material of chief value," it is invariably qualified by the words "not otherwise specified," or "not otherwise provided for," and in no instance by the term "not otherwise HEREIN provided for."

In the Statutes of '42, '46, '61 and '64, in which the above terms are used, silk articles are enumerated either by their specific names, or by the name of the class including them, in different sections of those acts, from what may be termed the silk sections, which demonstrate absolutely that it has not been the purpose of Congress to include all articles made of silk in the classification of "manufactures of silk not otherwise provided for," at a uniform rate of duty.

Among those enumerations:

"Articles worn," &c., and "wearing apparel" "of whatever materials composed," unqualified by the words "not otherwise provided for," were as early as 1842, and 1846, and up to 1861, used in opposition to the general clauses "manufactures of silk, *not otherwise specified*," and "manufactures of silk, or of which silk shall be a component material, *not otherwise provided for*."

The same opposition of terms exists in the act of 1861, the clause "articles worn," &c. being there for the first time limited by the words "not otherwise provided for," the wearing apparel clause continued, however, unlimited in the same language as in Schedule C of the Act of 1846.

In 1853, this Court, in Maillard *v.* Lawrence, 16 How., 260, defined wearing apparel to be "every article which in its design and completion, and received uses, is an article of wearing apparel, and to comprise such article within Schedule C of the Act of 1846, no matter of what material composed, either in whole or in part, or by whom composed or made up, whether by the tailor, seamstress or manufacturer.

"The question to be determined has no relation either to

material or process, or agent, but exclusively to the origin and purposes of the subject of duty imposed, as being in its design, and in its finished condition "wearing apparel," simply in other words whether shawls are shawls."

This was contrasted with "ready made clothing," ante, same page, defined as "such habiliments, as were either by necessity, or by a regard to comfort or utility, required to be changed from their original shape or fashion, and reshaped, and reconstructed, in order to adapt them to the human body, or to the purposes of life."

The Act of 1861, was the first comprehensive Tariff Act passed after the Act of '46, under which this decision, in 1853, arose the Act of 1857, having for its general purpose, simply the reduction of rates of duties affixed to the schedules of the Act of 1846. And Congress must he presumed in the legislation of 1861, to have had in view this decision in Maillard *v.* Lawrence. Hence we may reasonably suppose that "articles worn," &c., in the Act of 1861, were then, for the first time, qualified by the words "not otherwise provided for," in view of that decision, which classification, unqualified, would have conflicted with the "wearing apparel" clause as defined by this Court in that decision, and which wearing apparel clause it is to be marked, was *not* thus qualified for the like reason.

An article having been identified by a course of legislation, under a given designation, for revenue purposes distinct from the general classification to which it might otherwise be assigned, it must be treated as a distinct article.

De Forest and *al. v.* Lawrence, 13 How., 282.
Elliott *v.* Swartout, 10 Pet., 182.

"And it is fair to presume in case a special meaning were attached to certain words in a prior Tariff Act that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject matter.

Reiche *v.* Smythe, 13 Wall., 164.

Before adopting the conclusion that the silk clause in the Act of March 2, 1861, was an exhaustive provision for all articles made of silk, we must look at the remaining parts of that act.

"Articles worn," &c., and "wearing apparel," &c., are unquestionably there provided for by name, 12 Stats., 191.

Upon pages 184, 185 and 186, general provisions equally comprehensive as the silk provisions, are found for goods made of wool, worsted, cotton, flax or linen, on page 192 for hats and bonnets, manufactures of mixed materials, and of leather, and of goat's hair or mohair and many others

What effect, then, can possibly be given under the foregoing construction to "articles worn," &c., and "wearing apparel," &c., classifications of things according to their uses. Can any article of those descriptions be imagined which is not covered by and embraced in these general clauses classing things according to the material of which they are made, if these are the true and only standards of classification.

"It is the duty of Courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done, and thus preserve the harmony of all their provisions."

Bend *vs.* Hoyt, 13 Peters, 263-272.

In Strode *vs.* Stafford, Justices, 1 Brock, 162-165, Chief Justice Marshall calls this an "axiom."

Harrison *vs.* Vose, 9 How., 372-380.
Stuart *vs.* Maxwell, 16 How., 150-163.
Ogden *vs.* Strong, 2 Paine, 584-587
Kents Com. Vol. 1, p. 461, 462.

"Those political motives which induce the Legislature to select objects of revenue and to tax them under particular circumstances are not for judicial consideration. Where the Legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different sit-

uations, it is not for the Courts to beat down these distinctions on the allegation that they are capriciously made and therefore to be disregarded."

C. J. Marshall in Pennington *vs.* Coxe, 2 Cranch, p. 59.

We now come to an act of great significance under the doctrine of Smythe *vs.* Fiske, viz., that of Aug. 5, 1861, to provide increased revenue from imports. In that act § 2, 12 Stats., page 293, near middle is found a silk clause of the same structure as § 8 of the act of June 30, 1864. No mention is made in any part of the act of any articles which could conflict with the theory that the silk clauses there were intended to be exhaustive. In the Act of 1864, there are such clauses. Both acts were to provide increased duties, neither act mentions "articles worn," &c., or "wearing apparel," &c. Now, if the doctrine of intentional exhaustiveness and consequent repeal is good in Smythe *vs.* Fiske, as to the silk clauses in the Act of 1864, it is far more conclusive under the Act of Aug. 5, 1861.

In both the duties on silks, &c., were increased, there was just as much of a solecism under one act as the other in restraining the operation of the general words and we are to suppose that Congress, under like circumstances, using like language, meant that it should be applied in the same sense.

It seems to us that these conclusions are not to be controverted. Let us now examine the next tariff Act, passed July 14th, 1862, 12th Stats., 543, which was also to increase duties on imports. There is an absence in this act of any general silk clause, but upon page 550, near top, is found lastings and silk for slippers and buttons; on page 552, near top, manufactures of india rubber and silk, and on page 556, near top, "articles worn," &c., and at the middle of the page "wearing apparel," &c.," so too at the top of 557 manufactures of mixed materials in part of silk, and manufactures of silk if embroidered, &c., and near bottom velvet when printed, &c.

The enacting clause of the Section (§ 13, page 555, bottom,) is: "That from and after the day and year aforesaid, in addition

to the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected and paid," &c.

Was this not a legislative declaration that there were at the passage of this act duties upon these *articles* as articles which were to be increased. If "manufactures of silk not otherwise provided for' in the Act of August 5, 1861, repealed as to silk articles, such a positive unqualified provision as "clothing ready made and wearing apparel of whatever description, of whatever material composed, except wool made up or manufactured wholly or in part by the tailor, seamstress or manufacturer." in the Act of March 2, '61, how was it that an *additional duty* was imposed July 14, 1862, *totidem verbis*, upon the same articles without the slightest reference to the silk provisions of the Act of Aug. 5, '61.

The conclusion is irresistible that the Act of 1862 recognized the Act of 1861 as in full force as to the articles there mentioned notwithstanding the intermediate Act of Aug. 5, '61, as to manufactures of silk. There cannot be two opinions on this subject.

But there is one other fit consideration which is that the clause relating to "wearing apparel" &c., did have a subject excepted out of it both in the Act of March 2, 1861, and July 14, 1862. The exception was specific and absolute—"*except 'wool'*"—*expressio unius*, &c. And under this exception examination of the wool sections shows quite as specific provisions there for the excepted wool articles as in the original clause. This is not so in the silk clauses. Is it reasonable then to give the latter the same effect as the former?

We have now reached the Act of June 30, 1864, 13 Stats., which, like the former acts, is entitled and has for its object increase of duties.

We there find provided for generally wool, &c., cotton, linen and flax, and silk in general sections, framed in like manner, viz., first enumerating articles specially at differing rates and concluding, *e. g.*

P. 209, middle. "All other manufactures of cotton not otherwise provided for." "Other manufactures of flax, &c., or of which flax, &c., shall be the component material of chief value not otherwise provided for," page 210, middle, § 8. "On all

manufactures of silk or of which silk is the component material of chief value not otherwise provided for." "This *section* thus construing this clause covers the whole subject of silk in all its variety of forms. It was complete in itself." Smythe *v.* Fiske, 23 Wall, p. 381. A negation of this is found in other parts of this very Act of 1864 *vide* p. 207, middle, last clause of marginal title flannels. "On flannels composed in part of silk" —(silk even of chief value;) lower down on same page, clothing and wearing apparel in *part* of wool (the remaining part, *e. g*, silk), at the top of the next page 208, "Balmorals and goods of *similar description* or *used for like purposes*, composed of wool, worsted, or *any other material*," (thus providing for all silk petticoats, &c.); lower down on same page, "lastings, silk, &c., for shoes and buttons," 10 per cent.; page 214, middle.

"Pipe cases and *all smokers' articles*," thus providing for velvet, satin and silk, pipe cases and pouches for fine meerschaum pipes, silk pouches for smoking tobacco, cigar cases, and for smoking caps of silk or velvet.

These are only a few of the many illustrations drawn from the remainder of the Act of 1864, that the 8th Section did not "cover the whole subject of silk in all its variety of forms."

Did then the *whole Act* of 1864, cover the whole subject of silk in all its variety of forms?

Had it been a complete tariff and all past legislation been obliterated from the statute book, or had it been the first ever enacted, the state of facts would have been different.

But it is plain under the existing facts and the canons of construction that the general clauses of the Act of 1864 must be restrained in accordance with the remainder of the system of legislation of which it formed only a part. The language of this act must be given as far as possible the same effect as the same language in other acts in *pari materia*. If "manufacturers of silk not otherwise provided for" in the Act of Aug. 5, 1861, did not repeal the provisions for "articles worn," &c., and "wearing apparel," in the Act of March 2, 1861, neither are

these provisions in the Acts of March 2, '64, and July 14, '62, repealed by "manfactures of silk not otherwise provided for" in the Act of June 30, 1864.

But we do not rest our conclusions solely on the above reasoning. The 22d Section of this very Act of 1864, 13th Stats., p. 210, provides "that the duties upon all goods, wares and merchandise imported from foreign countries not provided for in this Act, shall be and remain as they were according to existing laws prior to the twenty-ninth day of April, eighteen hundred and sixty-four."

The 29th day of April above mentioned has reference to a temporary increase of 50 per cent. of all duties on that date by the Joint Resolution found in 13th Stats., page 405.

This 22d Section declares in terms not to be mistaken that the Act of 1864 was not intended by Congress to be a comprehensive tariff.

It referred to the former laws, emphatically declaring them a part of the existing tariff scheme.

But this was after all only a legislative adoption of the rules of judicial interpretation of statutes. Nothing hostile to those rules can, however, be availed of on the theory of a different legislative intention.

Now the point on which Smythe *v.* Fiske turned was that the Act of 1864 was a comprehensive Act, especially so on the subject of silk. The 22d Sec. shows conclusively that preceding Acts were present to the mind of the draftsman of the Act, and the rule that the last legislation controls is qualified by the rules for ascertaining first what that legislation is, and what it embraces.

We must first judicially ascertain the existence and extent of conflict between different provisions before we can dispose of that conflict on the theory of constructive repeal and repugnancy.

"Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for" in Sec. 8 of the Act of 1864, must be construed together with the provisions of Sec. 22, so as to read, "manufactures of silk, or of which silk

See cases cited in Sedgwick on Stat. and Con. Law, 245-6, and Potter's Dwarris, 199.

But again, the word "herein" is of peculiar force and effect in Tariff legislation, where many separate acts, and parts and clauses of acts all in *pari materia* are in operation at the same time. And where Congress intends to use it, it uses it in terms, *vide* Act March 2, 1867, § 2, (14th Stats. 561, top), "all manufactures of wool of every description made wholly or in part of wool not *herein* otherwise provided for," also Act February 24, 1869, latter part of act (15 Stats. 274), "all manufactures of copper or of which copper shall be the component or chief value not *herein* otherwise provided for."

As to the foregoing citation from the wool act of 1867, it is to be noted that in the corresponding clauses in the wool sections of the act of 1864, the word "*herein*" was *not* used, nor was it in the silk Sec. 8. The foregoing acts were in force at the time of plaintiff's importation in 1872.

Again, where Congress has made the omission of the word "herein" by accident, it does not leave the Courts to supply it, but makes haste to insert it by legislation. On the 14th of July, 1870, Congress passed an Act 16th Stats. 256, the tariff portions of which were to go into effect after Dec. 31, 1870, § 22, p. 262. They adjourned the next day and on the 30th of January, 1871, at their next session passed a joint resolution, 16th Stats. 592-3, § 2, of which is for nothing else than to insert the word "herein" between "otherwise," and "provided for" in the foregoing act. Furthermore, it was expressly declared to be *retroactive* in its effect; going back to the first of January, 1871.

When they were ~~connecting~~ correcting accidental omissions of the word "herein" in former laws is it not reasonable to presume that if the absence of the word in the Act of 1864, six years previously, was also an accidental omission that they would not at that time have corrected it. And yet, this legislation had been had two years before the plaintiff's importation which was in 1872, and the Act of 1864 was to be construed in the light of it.

Are we at liberty to assume that with all the pains taken by Congress to insert the word "herein" by positive legislation when they meant to use it, and again by positive legislation to insert it where they had accidentally omitted it; that they intended the *great multitude of cases where they did not use it*, of which the silk clause in the Act of 1864 is *but one* should follow the same rule as where they had used it.

The Revised Statues were passed two years after the plaintiff's rights had become vested, and the Act of February 8, 1875, later still, 18th Stats., p. 307. Neither act could under well established principles have any retroactive effect, and in the Revised Statutes, § 5597, expressly declares this principle as to them, and yet the last clause of schedule H simply repeats the language of the last clause of § 8, Act June 30, 1864, without the insertion of the word "herein."

The Act of February 8, 1875, § 1, where the intention was unquestionably to make the body of the section exhaustive on the subject of silk and silk articles, uses for the new classification intended to include them, words of apt and significant meaning, "on *all goods, wares and merchandise* not otherwise *herein* provided for, made of silk, or of which silk is the component of chief value irrespective of the classification thereof for duty by or under previous laws or of their commercial designation." Contrast, "on *all goods, wares and merchandise* not otherwise *herein* provided for made of silk, &c.," with "*on all manufactures of silk &c., not otherwise provided for*" in the Act of 1864, do they mean the same? Is one the equivalent of the other on its face or should it be so construed with the other Statutes in *pari materia ?*

An inspection of the whole of the Revised Statutes shows that Schedule H, was no more exhaustive in its comprehensiveness of articles made of silk, or of silk and other materials, silk of chiefvalue than were the earlier statutes. Under Schedule L, upon page 475 Revised Statutes, many articles are enumerated by name or class in which silk may evidently be the component of chief value. At the middle of p, 476, silk oil cloth is provided for. Under Schedule M, sundries, at the top of page 479.

manufactures of silk if embroidered are enumerated, and below that "fans and firescreens of every description, except common palm leaf fans, of *whatever material composed.*" Are not silk and satin fans the great staples in that branch of manufacture and trade? Near the bottom of the same page articles made of fur "or of which fur shall be a component material," not of chief value are provided for, and all these foregoing articles on this page are at 35 per cent.

On the next page, 480, below the middle, manufactures of india rubber and silk are enumerated.

Near the bottom of page 483, "lastings" and "silk-twist," &c., for buttons are provided for at 10 per cent. Opposite on page 483, pipe cases and "all smokers articles" are provided for. On page 485 silk umbrellas and velvets are provided for. If it were material an examination of the report of the Commissioners to revise the Statutes commencing with the note on page 1173 and extending to Schedules A, B, E, L and M in comparison with the Revised Statutes as enacted, might disclose a very different explanation why it was that the exceptions of "linen and silk" came to be made in the clothing clause of Schedule M, but our objection to the whole line of argument drawn from statutes passed since the plaintiffs' importation and since his rights vested is that those rights cannot be altered by the subsequent statutes without violating that great principle of statutory construction that retroactive effect shall not be given statutes unless they so explicitly declare. None of these statutes did so declare and as we said before, § 5597 of the repeal provisions forbade a retrospective effect.

As was said by Judge Miller in Murdock *v.* City of Memphis, 20 Wall., 617, "whatever might have been our abstract views of the effect of the Act of 1867, we are, as to all *future* cases, bound by the law as found in the Revised Statutes."

And when a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those right.

Fletcher *v.* Peck, 6 Cranch., 135, 136.
Steamship Co. *v.* Joliffe, 2 Wall., 450.

Plaintiffs' rights were statutory, Sections 13 and 14, Act June 30th, 1864, 13th Stats., p. 214-215, and the action was brought Sept. 17, 1872, Record fol. 4.

It is true that the terms of an earlier act may be explained and construed by the light of a later one, but the application must be only to cases arising after the passage of the later act.

Postmaster Gen. *v.* Early 12 Wheat., 148-149.
Bassett's Case, 2 Ct. of Claims, 448-450.

The acts intermediate between the Act of 1864 and the date of plaintiffs' importation, relating to silk articles, and which throw legitimate light upon the legal classification of his goods, are those of March 3, 1865, § 3 of which, enacts 12th Stats., p. 493, that "from and after this act takes effect in lieu of the duties heretofore imposed by law on the importation of the articles mentioned in this section, there shall be levied, collected and paid the following duties and rates of duty, that is to say in the last clause "on ready made clothing of silk, or of which silk shall be a component material of chief value, sixty per centum *ad valorem*.

What is the effect of this section?

Under the theory of Smythe *v.* Fiske, the classification of "ready made clothing of silk," &c., in the Acts of 1861 and 1862, had been repealed by "manufactures of silk," &c., in § 8, Act June 30, 1864, consequently, in 1865, there were no existing duties on "ready made clothing," &c., as articles.

Our theory is to the contrary. With which does the language of the Act of 1865, most agree? Does not that Act contemplate that at its passage there were duties then existing imposed by law on the "articles" "ready made clothing of silk," &c., which duties they wished to change by the imposition in *lieu* thereof of a *new rate of duty* on the same "articles" by the same enumeration.

We contend that "ready made clothing" was a continuing enumeration up to 1865, when the duty was changed from 35 per cent. to 60 per cent. for the first time. While the duty on

that class of goods was thus changed, the duty on *"wearing apparel"* which, under Maillard *v.* Lawrence, was defined to be a distinct and broader enumeration than "ready made clothing," was unaffected to this extent, vis: that all articles of wearing apparel of silk, which were not ready made clothing, remained dutiable after 1865, as they were before, and were so when the plaintiffs' goods were imported in 1872.

In the Internal Revenue and Tariff Act of July 14, 1870, 16th Stats., page 264, near bottom, *"silk buttons"* are increased from 40 per cent., under § 2, Act Aug. 5, 1861, where they are last mentioned, to 50 per cent. This, for like reasons, as in the case of ready made clothing, under the Act of 1865, recognized the existence, up to 1870, of "silk buttons," notwithstanding the Act of 1864. If they were dutiable at 50 per cent, under the Act of 1864, as "manufactures of silk not otherwise provided for," and they were not specifically enumerated there as buttons or otherwise, how idle and meaningless was the legislation in 1870, putting the *same* rate of duty on them, viz: 50 per cent. in *lieu* of the same duty of 50 per cent in the Act of 1864.

The similitude section of the Act of 1842 has no bearing on the question for it applies only to articles *not enumerated.*

The whole purpose of this argument has been to show that neckties of silk *are* enumerated as wearing apparel and articles worn. Smythe *vs.* Fiske holds that they are enumerated as manufactures of silk, &c., so that in either view they *are enumerated* and so not subject to classification by similitude.

Of the alternative intimation thrown out by the Court there, that had they not so held, they would have classed neckties by similitude with scarfs. We have to say, that so far as we can discern in the absence of the reasoning to support it, the conclusion seems to be predicated upon the idea that, even without the clause manufactures of silk, &c., the remaining enumerations of § 8, Act, June 30, 1864, would have operated as a repeal of all prior duties on silk articles. But this cannot be so under the 22d Sec. of that act. Again the similitude clause can give no aid to a present enumeration in overthrowing a former

one by their *joint* force, absolute nonenumeration is its life, and what it cannot grasp by its *individual* force as *nonenumerated* can be touched by it in no other way.

If the construction of the Act of July 14, 1870, were that the enumeration of silk buttons and ornaments for dresses *aided* by the similitude clause effected a repeal of all prior duties on silk articles and goods, would it not be an astonishing one? Or if Congress to-day were to impose special duties on certain silk articles, must all the other articles at different rates now existing thereby become dutiable by similitude at one rate.

The conclusion is that, neither directly nor indirectly singly or in combination, can the similitude clause have any *repealing* effect upon articles once enumerated.

We concur with the Court in Smythe *vs.* Fiske that, if the assumption in that case were correct, viz.: that the 8th section of the Act of 1864, was intended to be exhaustive on the subject of silk in all its forms, then silk neckties were dutiable as there enumerated under the term "manufactures of silk not otherwise provided for," but we deny the premise that it was intended to be exhaustive.

Our conclusion then is, under this branch of the argument, that the decision in Smythe *vs.* Fiske was erroneous; that the Court should have found that neckties of silk having been enumerated and provided for in the Statutes of 1861 and 1862, as articles worn, &c., and as wearing apparel at 35 per cent. *ad valorem*, were not affected by the general clause for "manufactures of silk," &c., in the Act of 1864. That being so enumerated they were not within the province of the similitude clause of the Act of 1842, which applies only to articles not enumerated. That they were not on the facts, ready made clothing nor scarfs. That they continued dutiable at 35 per cent. up to the time of the plaintiff's importation, and that the exaction of 60 per cent. was unlawful, and that the difference between that and the rate of 35 per cent. should be refunded to the importer, for which purpose the judgment in this cause should be reversed.

SECOND.

If the true rate of duty on the plaintiff's goods was 50 per cent., then the protest was sufficient.

§ 14 Act June 30, 1864, 13th Stats. 214.

"On the entry of * any goods, wares, or merchandise, the decision of the Collector of Customs at the port of importation, and entry as to the rate and amount of duties to be paid * thereon, shall he final and conclusive against all persons interested therein, * unless the owner, * &c., shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the Customs, * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall within thirty days after the date of such astertainment and liquidation, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive, and such * merchandise * shall be liable to duty accordingly, any Act of Congress to the contrary notwithstanding, unless suit shall be brought within ninety days after the decision of the Secretary on such appeal. * And no suit shall be maintained in any Court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless said decision * shall be delayed more than ninety days from the date of such appeal."

§ 7 Act July 28, 1866. An Act to protect the Revenue and for other Purposes. 14th Stats. 329.

That whenever it shall be shown to the satisfaction of the Secretary of the Treasury *that more moneys have been paid to the Collector of Customs or others acting as such than the law requires*, and the parties have *failed to comply* with the requirements of the fourteenth or fifteenth sections of the act entitled "An Act to increase duties on imports and for other purposes," approved June thirtieth, 1864, and the Secretary of the Treasury shall be satisfied that said non-compliance with the requirements as above stated, was owing to circumstances beyond the control of the importer, consignee or agent, making

such payments he may draw his warrant upon the Treasurer in favor of the person or persons entitled to the over-payment directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

The Act of Feb. 26, 1845, 5th Stats. 727, was similar to the Act of 1864, requiring the grounds of objection to be set forth distinctly and specifically.

In Burgess *v.* Converse, Judges Curtis and Sprague held at the May Term of 1855, in the First Circuit, vide 2 Curtis C. C., p. 222:

"I consider the Act of Feby 25, 1846, concerning protests to require a distinct and clear specification of *each substantive* ground of objection to the payment of the duties. But I do not think the merchant obliged to describe in detail the particular acts or neglects which he considers constitute such substantive objection.

These protests are commercial documents occurring in the course of trade and under circumstances when technical precision or fullness, cannot be expected and ought not to be required. They must be so distinct and specific as, when fairly construed, to show that the objection taken at the trial, was in the mind of the importer, and has not since been sought out, and also to draw the attention of the Collector to the substance of the objection, to the end that he may ascertain the precise facts and cure the defect, if one which is curable exists."

And in Swanston and al., *v.* Morton at the October Term of 1852, 1 Curtis C. C. 296, they had said "These protests are commercial documents; and though they must be certain and and distinct, they need not conform to any technical rule. If this protest, taken in connection with the other contents of the paper on which it is written, and to which it refers, makes known *what was protested against,* it satisfies the statute in this particular."

In the Second Circuit the inclination of Judges Nelson and Betts was to give a more stringent effect to the requirements of the protest. *Vide* Thomson *v.* Maxwell, July, 1852, 2 Blatch., 392, middle; "We shall persevere in applying the rule adopted in the present case to all others coming before us for judgment,

and in holding that the claimant must in his protest point out to the Collector by positive and direct notice every particular of fact and of law which he relies upon as protecting his goods from the payment demanded."

Reference is made on the preceding page, 391, to Judge Taney's decision in the Maryland Dist., April Term, 1851, in Mason *v.* Kane, reported in Taney's decisions, p. 173.

In this latter case the deficiency of the protest was principally in points of fact, pp. 176-7, and the decision appears to rest largely on that ground.

Shortly, subsequent to these decisions, the question came before this Court, which in Greely's Administrator *v.* Burgess *et al.*, Dec. Term, 1855, 18 How., 413, says near bottom of p. 416: "The ground of objection stated in the protest is, 'that the goods were not fairly and faithfully examined by the appraisers.' And the proof offered was that the appraisers did not examine nor see any of the original packages of the merchandise, and only saw samples which had been taken several weeks before, and which would not afford a true criterion by which to judge of the importation."

"This statute was designed for practical use by men engaged in active commercial pursuits," &c., &c. "We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the *source of his complaint* and his design to make it the foundation for a claim against the government."

"In the present instance he asserts that the goods were not fairly and faithfully examined by the appraisers. This, we think, was sufficient *without disclosing the grounds* upon which he contended that the appraisement *was unfair and unlawful.*"

This was the decision of the Court, six of the Justices concurring, and Chief Justice Taney and Justices Daniel and Nelson dissenting, because "the protest did not apprise the Collector of the particular objection taken at the trial, and which could easily have been removed by another appraisement if it had been brought to the notice of the Collector in the protest." P. 418.

And in Curtis's Administratrix *v.* Fiedler, 2 Black, 461, Mr. Justice Clifford says, p. 480, using nearly the exact language of the foregoing decision near bottom: "On the contrary, every one of them affirms the rule that the importer must at least indicate in his protest distinctly and definitely the *source or ground of his complaint* and his design to make it the foundation of a claim against the government."

Counsel for this last plaintiff., in error, urged upon the Court, at bottom of page 468, the doctrine in Thompson *v.* Maxwell, that the protest must, "by *positive and direct notice*, point out *every particular of fact and law;*" but this Court having previously in Greely's Administrator *v.* Burgess, rejected this doctrine likewise refused it in this case.

The protest is not to be subjected to the strict rules of construction relating to pleadings.

Burgess *v.* Converse, 2 Curtis's C. C., p. 223-4.

And yet in pleading, an information under the slave trade acts is sufficient if it pursues the words of the law, and the charge may be stated in the alternative if each alternative constitutes an offence which is a cause of forfeiture.

The Emily and the Caroline, 9 Wheat., 381; see remarks on pp. 386, 387.

And, furthermore, the importer is not confined to one ground of objection, nor are alternative nor even inconsistent grounds forbidden. And they need not all be sustained if the proper issue is raised.

The protest annexes conditions to a common law right, and Courts will not go beyond the words of the statute.

Hutton *v.* Schell, 6 Blatch., 48-57.

In difficult, doubtful or mixed questions of law or fact, where more than one statute may apply, and where Courts, counsel and experts may disagree, it can never have been intended to confine the importer to one view or compel him to elect one of several grounds of objection if the Court has jurisdiction under

any of the grounds specifically stated by him. The law was not made as a trap for either party.

Where there is in a pleading the averment of a legal conclusion against a previously admitted fact the fact is of the most importance, and must stand, and the conclusion will be disregarded.

Jones *v.* Phoenix Bank, 8 N. Y., 228.
Robinson *v.* Steward, 10 " 189.

And where words averred only a conclusion of law, if the conclusion is not justified by any facts stated in the pleadings, the averment is irrelevant.

If in a complaint setting up that duties were illegally exacted at 60 per cent. as upon scarfs, and we alleged that the goods were not scarfs, but neckties and wearing apparel and dutiable only at 35 per cent., and defendant demurred because neckties paid but 50 per cent., the demurrer would only affect the amount of recovery. That, under the most hostile construction of the protest, is this case.

If, in a general demurrer to the whole comlaint, the plaintiff is entitled to any relief whatever, although not demanded, the demurrer will be overruled. Stuyvesant *vs.* Mayor, &c., of N. Y. 11 Paige, 415.

If in any complaint, a party states facts entitling him to relief, and asks improper relief and issue is joined, the Court will grant such relief as the facts require.

Marquat *vs.* Marquat, 20 N. Y. 336.
Emery *vs.* Pease, *Ibid*, 62.

In principle, a protest containg a substantial "ground of objection" falls within the statutes of jeofails.

§ 32 Act, Sept. 24, 1789; 1 Stats. 91; Rev. Stats. § 954. The mischiefs the statutes is designed to prevent, apply so well here that we cite.

Roach *vs.* Hulings, 16 Pet. 321–322.
Day *vs.* Chism, 10 Wheaton, 452–4.
Also Mathewson Admrs. *vs.* Grants, 2 How. 263-281–2

Amendments will always be allowed if there is anything to amend by.

Nelson *vs.* Barker, 3 McLean, 379.

Now we suggest that the objection as to the averment of 35 per cent. as the true rate of duty on the neckties is one which more properly applies to the proceedings on the trial and the pleadings in the action than to the protest, provided the protest has sufficient grounds of objection on its face to give the Court jurisdiction of the action.

We say that sufficient grounds of objection were there explicitly stated, to raise the necessary issues regardless of the averment as to 35 per cent., and disconnected altogether with that averment or the facts on which it was predicated.

The assessment of duty by the collector upon the plaintiff's goods was as follows, viz: —

"*Silk scarfs subject to duty at 60 per cent. ad valorem.*" This is material in the interpretation of the protest, for it will be noticed that the goods are thus declared by the collector to be "silk scarfs" *eo nomine*, that was a question of fact, and the only one on which he predicated his assessment. Against this decision the following protest was made.

"We protest against your assessment of duty at 60 per cent. on the neckties and wearing apparel in case [D] J. 8105, etc., entered by us for consumption, April 10, 1872, per City of Montreal from England, because they should only pay duty being articles worn by men, women, or children, &c., and wearing apparel," [under Sections 22, Act of March 2, 1861; § 13, Act of July 14, 1862, at 35 per cent. *ad valorem.*]

"They are neither scarfs nor ready made clothing, in fact, nor as known in trade and commerce."

"We pay the excess under compulsion soley to get the goods."

Now strike out the words enclosed in brackets as error under the decision in Smythe *vs.* Fiske.

And we claim the right to strike it out for redundancy, as being one of the particulars of law not necessary to the protest under the foregoing decisions, and what do we have left as objections.

A protest against your assessment of duty at 60 per cent. on the neckties and wearing apparel, in a designated case or package, entered by the importers for consumption on a given date, by a particular vessel from England, because they are neither scarfs nor ready made clothing in fact, nor as known in trade and commerce, (this last clause had no connection with the rate of 35 per cent. claimed), and a notice of compulsory payment solely to get the goods.

Now the law requires us only to state our *objections* distinctly and explicitly, the consequences flowing from them we are not required to state, the two are as different as cause and effect. The collector having declared our goods to be "scarfs" *eo nomine*, we denied it and told him what they were, viz. : neckties and wearing apparel. It was then his duty to have examined the questions of fact thus set up. This he chose not to do, but to leave the contention to the Courts. Our protest gave the Court jurisdiction which ousted that of the collector, to try the issue thus presented. And in Smythe *vs.* Fiske, it appears 23 Wall. pp. 382–3. "The question whether these neckties were either scarfs or ready made clothing was submitted to the jury and they must have found the negative as to both."

As to the true rate of duty arising upon the facts proved under the protest, we quote the language of Judge Nelson in Belcher *v.* Laurason, 21 How., 256: "It has been argued that, admitting the goods were properly subject to the fifty per centum increased duty, under the 17th Section of the Act of 1842, inasmuch as this was not imposed by the collector, but the higher increased duty, under the 8th Section of the Act of 1846, the Court below erred in charging the shipments in question with the former duty. But the answer to this objection is that the law imposes the increased duty in case of under valuation, and not the collector. It is true he is the agent of the Government to collect it, as he is in collecting the ordinary rate of duties, but in no other sense or character. The law declares in the case contemplated by the Act, and which existed upon the proofs before the Court, that in addition to the ordinary duty there shall be levied and collected, &c., fifty per centum, &c. No demand of the collector was necessary to create the

liability. That arose as matter of law upon the facts disclosed in the record, and it was the duty of the Court to enforce it; and hence the excess over this increased duty arising under the 17th section, constituted the just amount which the plaintiffs were entitled to recover.

Judgment of the Court below affirmed."

That was a case so similar to this that we ask careful consideration of it.

A penalty of $6,159.20 was paid under protest in like manner as duties at the rate of 60 per cent. were paid under protest here:

That penalty was held by the Court to have been levied under a statute inapplicable to the case.

So here the duty of 60 per cent. was held inapplicable. The exaction in each case having been wrongful, the judgment of the Court would have been to repay the *entire exaction*, but acting in the administration of the law, the collector having been ousted of his jurisdiction, the Court in the penalty case raised an offset by way of a different penalty under a different statute amounting to $4,619.40, and gave judgment for the difference between the two amounts, so here the offset raised by the Court under a different provision of the statute at 50 per cent. is to be deducted from the original exaction at 60 per cent.

Now the gist of the objection to the protest is, that we did not raise up the precise offset that the Court raised up.

The collector cannot say that he was misled to his damage as to the amount, for the difference on the face of the protest is greater than by the allowance of the Court. Nor as to the facts, for he put his in issue against those of the plaintiff, and the verdict was against him, and the judgment of law was also against him as to his rate of duty of 60 per cent., which he put in issue.

The reason of the law changing, the law changes with it. It was formerly held, in the absence of legislation, about to be noted, that as there was a certain amount of personal liability on the part of the collector the protest must have the effect to protect him personally. If Congress has since absolved him of personal liability that reason and construction fails.

By Act of March 3, 1863, Section 13, 12th Stats. 741, it was made the official duty of the District Attorney to appear in his official capacity, and defend all suits or proceedings against collectors for the recovery of any money exacted by or paid to such officers which shall have been paid into the Treasury of the United States; and by Section 12 of the same act, where a recovery shall be had in such suit or proceeding, and the Court shall certify that there was probable cause for the act done by the collector, "*or that he acted under the directions of the Secretary of the Treasury* or other proper officer of the Government, *no execution shall issue against such collector* or other officer but the amount so recovered shall upon final judgment be provided for and paid out of the proper appropriation from the Treasury."

These provisions appear as Sections 771 and 989 of the Revised Statutes.

By the Act of Feby. 21, 1863, 12 Stats., p. 657, in case of appeal or writ of error the defendant gives no bond for nor is liable for costs. Rev. Stats. §1,001.

In view of this legislation the 14th Sec. of the Act of June 30, 1864, was enacted and following that the 7th Section of the Act of July 28, 1866, recognizing that a protest was not required to make a payment unlawful and authorizing the Secretary to waive protest.

Now it appears by this legislative system that the Collector is absolved from all personal responsibility, and that he is a mere nominal defendant in these actions.

Under the 14th Section of the Act of 1864, if no protest is made no subsequent demand can be made on him.

If in the ninety days the Secretary reverses the decision of the Collector the repayment is made forthwith under the authority of the 16th Section of the same act, and that ends the matter. If the Secretary affirms and adopts the action of the Collector, then the subsequent proceedings are quite immaterial to the Collector.

The reasonable conclusion from this change of the system which has arisen since any decision of this Court on the nature

and effect of the protest seems clearly to be this, that the protest should bring to the attention of the Collector and Secretary the material facts in the case, including errors of procedure, that correction may promptly be made if correction necessary, and that the evidence should be noted and preserved in anticipation of the trials which may reasonably be expected.

It is needless to discuss here the effect to be given to a protest where no facts are in dispute, and the issue is purely of law, we may dismiss that with the remark that such a case is not this case.

But in cases involving pure questions of fact, or mixed questions of law and fact, is it not evident that the great object of the protest is to embrace the facts and that the legal consequences of those facts can, with equal safety and propriety to both parties to the issue, be justly and fairly examined and passed upon at the trial without requiring merchants in the preparation of commercial documents in the hurry of business, to embody in their protests legal questions, and holding that if any one of them be wrong the whole protest is vitiated.

Whatever may be said about the averment at 35 per cent. in the present protest, it is evident that the facts set up did not all tend to that conclusion, and had the collector examined those facts it is to be presumed he would have altered his classification of the goods.

If anything may be presumed from the decision of Smythe *vs.* Fiske, it is that this Court having the protest in the record before them at 35 per cent., held it to be a good protest under their decision as to 50 per cent. The judgment of the Court was 23 Wall. p. 383. "JUDGMENT REVERSED and the cause remanded to the Circuit Court, with directions to award a *venire de novo* and proceed IN CONFORMITY TO THIS OPINION."

This Court evidently granted a new *venire* for the adjustment of the amount to be found due the original plaintiffs under the decision. Otherwise its reversal would have been absolute, for we are well assured that this Court did not mean to pronounce so vain and oppressive a judgment as would follow from the interpretation that a new *venire* and proceedings were

to be had in the lower Court, simply to result in what would have resulted by a simple reversal of judgment here.

Finally, this objection of the defendant is entitled to no favor in this Court, for it is not based on the justice or right of the cause, and to be brought up now at this late stage of the litigation is not in accordance with good faith or good morals. The presumption is, that when private rights are for the public welfare, made to yield for the time being to summary process for the collection of taxes, and the law grants a remedy to the citizen for any wrong he may have suffered in the process, that the government goes into Court to ascertain what right and justice require to be done upon the merits of the controversy, and when that has been ascertained that it will carry it out. And when, as in this case, it has been ascertained that at least 10 per cent. was unlawfully taken on these goods and the government has had that excess in its possession during this litigation, and is authorized, by a law which declares that a protest is not requisite to make the original collection unlawful, to repay without any protest at all—then it is to be presumed that a contention at this stage of the proceedings about a technical point in the protest which contained merits enough to bring this Court to a conclusion on the merits will not now be allowed by this Court to render its adjudication fruitless to those citizens whom it has declared entitled to relief. Is this litigation to go for nothing?

And under this position the judgment should be reversed and the Court below should be instructed to proceed to give judgment for the plaintiffs for the amount admitted by the parties to the record to have been exacted in excess of the rate of 50 per cent. on the neckties imported.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1877.

JOHN M. DAVIES, &C., PLAINTIFFS IN ERROR,
vs.
CHESTER A. ARTHUR, COLLECTOR, DEFENDANT IN ERROR.
} No. 492.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant in Error.

to be had in the lower Court, simply to result in what would have resulted by a simple reversal of judgment here.

Finally, this objection of the defendant is entitled to no favor in this Court, for it is not based on the justice or right of the cause, and to be brought up now at this late stage of the litigation is not in accordance with good faith or good morals. The presumption is, that when private rights are for the public welfare, made to yield for the time being to summary process for the collection of taxes, and the law grants a remedy to the citizen for any wrong he may have suffered in the process, that the government goes into Court to ascertain what right and justice require to be done upon the merits of the controversy, and when that has been ascertained that it will carry it out. And when, as in this case, it has been ascertained that at least 10 per cent. was unlawfully taken on those goods and the government has had that excess in its possession during this litigation, and is authorized, by a law which decrees that a protest is not requisite to make the original collection unlawful, to repay without any protest at all—then it is to be presumed that a contention at this stage of the proceedings about a technical point in the protest which contained merits enough to bring this Court to a conclusion on the merits will not now be allowed by this Court to render its adjudication fruitless to those citizens whom it has declared entitled to relief. Is this litigation to go for nothing?

Any under this position the judgment should be reversed and the Court below should be instructed to proceed to give judgment for the plaintiffs for the amount admitted by the parties to the record to have been exacted in excess at the rate of 50 per cent. on the invoice imported.

EDWARD HARTLEY,
WALTER H. COLEMAN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN M. DAVIES, &c., PLAINTIFFS IN ERROR,
vs.
CHESTER A. ARTHUR, COLLECTOR, DEFENDANT IN ERROR.
} No. 492.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN M. DAVIES, &C., PLAINTIFFS IN ERROR,
vs.
CHESTER A. ARTHUR, COLLECTOR, DEFENDANT IN ERROR. } No. 492.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

The question in this case is whether upon the facts stated the plaintiff in error made a protest sufficiently *specific* and *distinct* to enable him to recover certain money paid by him for duties.

The goods imported were *Ducape Eglington ties*, being neck-ties made of silk (Record, folio 7); and the rate of duty exacted was 60 per cent. *ad valorem* (folio 9). By his protest the plaintiff claimed that the articles were liable to a duty of only 35 per cent. *ad valorem* (folio 12), and this suit was brought to recover the excess beyond that rate (folio 10). Upon the trial, however, it was admitted by both parties that the proper duty was 50 per cent. *ad valorem*. (Folio 10.)

The protest was as follows:

"NEW YORK, *April* 18, 1872.

"SIR: We protest against your assessment of duty at 60 per cent. on the neck-ties and wearing apparel in case ⟨D⟩, 8105, &c., entered by us for consumption, April 10, 1872, per City of Montreal, from England, because they should only pay duty, being articles worn by 'men, women, or children,' &c., and 'wearing apparel,' under sections 22, act of March 2, 1861, and 13, act of July 14, 1862, at 35 per cent. *ad valorem*.

"They are neither 'scarfs' nor ready-made clothing in fact, nor as known in trade and commerce.

"We pay the excess under compulsion only to get the goods.

"JOHN M. DAVIES & CO.
"By CHASE, HARTLEY & COLEMAN,
Attorneys, 51 *William street*.

"C. A. ARTHUR,
"*Collector of Customs, New York City.*"

The similarity of this case, except as regards the point now brought to the attention of the court, to that of Smythe *vs.* Fiske (23 Wall., 374), will be readily observed.

I submit that there is no error upon the record.

The opinion of Judge Wallace upon the trial below may be found reported in 13 Blatchford, at p. 14, and his judgment seems to be supported by the reasoning as well as the authorities cited, viz: Curtis *vs.* Fiedler (2 Black, 461); Thompson *vs.* Maxwell (2 Blatch., 385); Norcross *vs.* Greeley (1 Curtis, C. Cls. R., 114);

Swanston *vs.* Morton (1 Curtis, C. Cls. R., 294); and Kriesler *vs.* Morton (1 Curtis, C. Cls. R., 417).

The principle of these cases requires that the importer shall call the attention of the collector to the true statute that regulates the duty. The United States allow themselves to be sued only where the importer has by a protest submitted to the judgment of its officers the very facts or the very statutes which he declares upon in such suit; assuming as a conclusion of law for this purpose that if the party protesting was not able thus to lay down the true rule for correcting the alleged error of administration, there was really no such error.

In other words, there is no error in the transaction before the collector unless it were duly presented in the *quasi bill of exceptions* then submitted.

It seems that there is no substantial difference in this respect between a requirement of accuracy in regard to *statute* and of accuracy in regard to *fact*. The collector, in the press and distraction of official business, seems to be entitled as much to the one as to the other; and the words of the act of 1845 (Rev. Stat., sec. 3011), as well as the reason of the thing, as briefly suggested by Chief-Justice Taney (Mason *vs.* Kane, Decisions, p. 178), cover both classes of error.

S. F. PHILIPS,
Solicitor-General.

○